# 80-2193

NO.

Supreme Court, U.S.
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JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

October Term, 1980

CARL F. PAGE
Petitioner

v.

WILLIAM J. BOLGER

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

The Petitioner, Carl F. Page, brought suit against the Postmaster General claiming racial discrimination in that he was denied promotion to two supervisory positions in violation of § 717 of the Civil Rights Act of 1964, as amended by § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16. The majority of the United States Court of Appeals for the Fourth Circuit, sitting en banc, ruled that failure of the Postal Service to make "every effort" to insure minority representation on promotion review committees in violation of Postal Service regulations was not a personnel action subject to redress under Title VII, but merely a mediate decision. The dissent would allow the employee to prevail if he

proved the Postal Service violated the regulation that was intended to abolish racially segregated review committees. The questions presented are:

1. Whether a violation of governmental regulations intended to promote equal opportunity in the advancement of government employees may be redressed under § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

2. Whether a violation of a Postal Service regulation intended to abolish racially segregated review committees is an employment decision that may be redressed under § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

3. Whether the testimony of members of review committees constituted in violation of Postal Service regulations is sufficient to rebut the plaintiff's prima facie case under the proof scheme enunciated by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

4. Whether an employee is entitled to injunctive relief upon proof of a violation of Postal Service regulations requiring the Postal Service to make "every effort" to insure minority representation on promotion review committees.

5. Whether an employee is entitled to compensatory damages upon proof of a violation of Postal Service regulations requiring the Postal Service to make "every effort" to insure minority representation on promotion review committees.

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The petitioner, Carl F. Page, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 2, 1981.

## OPINIONS BELOW

The opinion of the Court of Appeals dated December 19, 1979 is published and not yet reported. The opinion of Court of Appeals sitting en banc dated April 2, 1981 is published and reported at 645 F.2d 227 (4th Cir. 1981). The opinion of the District Court for the Eastern District of Virginia is unpublished and unreported. All three opinions appear in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit sitting en banc was entered on April 2, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Amendment V to the UNITED STATES CONSTITUTION provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law; ... .

42 U.S.C § 2000e-16 provides in pertinent part:

> (a) All personnel actions affecting employees...in the United States Postal Service...shall be made free from any discrimination based on race, ... .

> (b)...[t]he Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.
>
> . . .
>
> The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions... .

5 C.F.R. § 713.201 (1978) provides in pertinent part:

> (a) Purpose. This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin... .
>
> (b) Applicability. (1) This subpart applies: (i) To...the U.S. Postal Service... .

5 C.F.R. § 713.202 (1978) provides:

> It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

5 C.F.R. § 713.203 (1978) provides in pertinent part:

> The head of each agency shall exercise personal leadership in establishing, maintaining, and carryint out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:
>
> * * *
>
> (b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion,

sex, or national origin, from the agency's personnel policies and parctices and working conditions... .

5 C.F.R. § 713.204 (1978) provides in pertinent part:

> To implement the program established under this subpart, an agency shall:
>
> (a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart; ... .

39 C.F.R. § 211.2(a) provides in pertinent part:

> (a) The regulations of the Postal Service consist of:
>
> * * *
>
> (3) The Headquarters Manual, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department. Any of the foregoing may be published in the Federal Register and the Code of Federal Regulations.

Postal Service, Personnel Handbook P-11, TL-4 (Dec. 31, 1975) provides in pertinent part:

> § 544.1-2
>
> The district manager selects a review committee composed, as a minimum, of:
>
> a. The district representative of the function having the vacancy (i.e., mail processing, customer services, support, or employee and labor relations). If the district representative is not available, an alternate representative is designated.
>
> b. A representative from the installation with the vacancy. If there is no person of sufficient level in that installation, a representative from another installation is designated.
>
> c. A representative from the sectional center which has jurisdiction over the installation with the vacancy. If the vacancy is in a sectional center itself, a representative from another sectional center is designated.

PES-17 and PES-18, within the Postal Service. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et. seq. and under 28 U.S.C. § 1343(4).

In 1976 Mr. Page, a black, was a foreman in the mails section of the Richmond Post Office. He applied for promotion to general foreman, a PES-17 supervisory position, in January of that year and was not selected. Mr. Page also sought promotion to postal operations specialist, a PES-18 supervisory position, in August, 1976. Again he was not selected.

The Postal Service's Personnel Handbook provides that for the PES-17 and 18

positions a review committee shall be designated to screen the applicants and to recommend the "most outstanding candidates" to the selecting official. The committee must consist of at least three members who are to be representatives of the district office, the installation with the vacancy and the sectional center. The committee members must also be at an organizational level equal to or higher than that of the vacant position. In designating review committee members the selecting official must make every effort to select at least one woman and/or minority member. If none is available at the local level the regulations require the selecting official to furnish the minority member from the next-higher organizational unit, where available.

The review committee for the PES-17 position consisted of white males. The Postal Service offered evidence to the effect that there were no black employees at the local level of sufficient rank qualified to serve on the committee. There was no evidence offered of efforts made to secure a minority member from the next highest organizational unit. No explanation was given as to why the Postal Service failed to follow its regulations in this regard.

The evidence introduced with regard to the PES-18 position showed that there was one employee from Norfolk who was qualified to serve on the committee. No explanation was offered by the Postal Service as to why the Norfolk employee or a minority employee from the next higher organizational unit did not serve.

During the committee meeting for the PES-18 position one committee member asked Mr. Page about filing an EEOC charge with regard to his non-selection for the PES-17 position. As a result of those comments and Mr. Page's protests, the district manager voided the action of the all-white male review committee and directed that a new committee be convened and that one of its members be a black employee. Even though the action of the first PES-18 committee was voided the gentleman whom that committee selected was put into the PES-18 position on a temporary basis until the second committee could be convened.

Approximately six months later the second PES-18 committee was convened. It consisted of all-white males. A black employee from the Eastern Region had been

designated to sit on the committee but was unable to serve. The Postal Service offered no explanation for the substitution of a white male employee when a black employee had been requested in order to comply with the regulations. There was no suggestion that another black employee was not available.

Mr. Page's qualifications would have justified his selection to either the PES-17 or PES-18 position. When the appeals examiner reviewed the relative objective qualifications of Mr. Page and the PES-18 appointee he summarized as follows:

> This comparison shows that [Page] has more formal education than the [appointee] and slightly more supervisory experience than the [appointee]. On the other hand, the [appointee] has a higher performance evaluation, (although both evaluations are close to outstanding in nature) and greater length of service than [Page].

> Both employees appear to be highly qualified for the position; therefore, the examiner does not believe it is clear, from this comparison, that [Page] is better qualified than the [appointee] for the position in question. App. 172-74.

The appeals examiner also observed that the selection process was "highly subjective" and suggested improvements to reduce "the great margin of subjective inconsistency among the panel members' evaluation of the candidates." App. 171.

Instead of introducing evidence to show the efforts it has made to comply with its regulations, the Postal Service introduced the testimony of the all-white committee members. The district court found that Mr. Page's prima facie case was rebutted, and the inference of discrimination dispelled, by the testimony of the review committee members that

they did not discriminate against Mr. Page because of his race, but instead simply considered him relatively less qualified on an objective and subjective basis than the successful applicant.

On appeal a majority of the Court of Appeals for the Fourth Circuit, by decision dated December 19, 1979, found that the Postal Service regulations are mandatory, that Mr. Page had proved his prima facie case in accordance with the principles enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the Postal Service had failed to produce evidence that Mr. Page was rejected for a legitimate non-discriminatory reason. In refusing to accept the testimony of the all-white committee members as sufficient rebuttal evidence the majority held that an employer could not rely on the subjec-

tive judgment of individuals whose power to make an employment decision exists only by virtue of a flagrant disregard for mandatory anti-discriminatory regulations. App. 86-88.

The dissent reasoned that the failure to follow the regulations was not a "personnel action" which under Title VII should be the proper focus of inquiry in the case. App. 101-9. The dissent considered the failure to follow the regulations to be a mediate act. The focus of the dissent was the reasons given for Mr. Page's non-selection.

Upon rehearing en banc the Court of Appeals, by a margin of seven to three, adopted the reasoning of the dissent. The April 2, 1981 opinion of the majority holds that the proper manner to asses the evidence under McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973) is to focus on the reasons given for the ultimate employment decision. Those are the type of "personnel actions" to which § 717 of Title VII refers. In the instant case those were the reasons given by the all-white review committee members for Mr. Page's non-selection. The April 2, 1981 opinion further holds that violations of regulations such as the composition of review committees are not "personnel actions" intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII. App. 30-31.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT WHICH HOLDS THAT 42 U.S.C. § 2000e-16 IS THE EXCLUSIVE, PREEMPTIVE REMEDY FOR REDRESS OF FEDERAL EMPLOYMENT DISCRIMINATION

In Brown v. GSA, 425 U.S. 820, 835

(1976) this Court held that "§ 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." The majority opinion of the Fourth Circuit accepted the fact that the Postal Service regulation in question was mandatory and "...therefore would be entitled to enforcement by a federal court..." but went on to state that "...does not in our view mean that, if violated, its violation must be redressed as if it constituted a direct violation of the substantive provisions of Title VII." App. 26.

The Fourth Circuit did not suggest what other means could be used to redress a violation of the antidiscriminatory regulation. Indeed, in light of this Court's opinion in Brown no other civil rights

statute could be used. Also, presumably the administrative framework established for federal employees complaints would not be available to an employee under the Fourth Circuit decision because a violation of the equal employment regulation allegedly cannot be redressed under the framework of 42 U.S.C. § 2000e-16.

This conflict justifies the grant of certiorari to review the judgment below.

## II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The decision by the divided Court of Appeals for the Fourth Circuit, sitting en banc, raises for the first time the applicability of Title VII, as amended by the Equal Employment Opportunity Act of 1972, to governmental regulations promulgated to promote the achievement

of the Government's policy of equal opportunity in employment and the full realization of those rights through continuing affirmative programs in Government agencys.[1] The Fourth Circuit's decision will frustrate the goal of equal employment opportunity in Federal Government by eliminating the ability of employees to require government agencies to follow the regulations promulgated to achieve equal opportunity under 42 U.S.C. § 2000e-16.

(1) The questions presented by this petition have an effect on all governmental agencies and employees covered by 42 U.S.C. § 2000e-16. The 1972 Amendments of Title VII for the first time brought specified agencies of the Federal Government within

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[1] 5 C.F.R. § 713.202 (1978).

the purview of the Civil Rights Act of 1964. Pursuant to the amendments the Civil Service Commission was directed to issue rules and regulations necessary to carry out the purpose of the statute.[2] In compliance therewith the Commission promulgated regulations in 1972 which required the head of each government agency to establish and maintain a program to promote equal opportunity in every aspect of agency personnel policy and practice in the advancement of employees.[3] The Postal Service regulation which was violated was developed pursuant to the directive of the Civil Service Commission and is therefore mandatory. App. 24-26, 43.

Although the majority decision of the

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[2] 42 U.S.C. § 2000e-16(b).

[3] 5 C.F.R. §§ 713.201 to 713.643 (1978).

is of great significance in the administration of complaints under 42 U.S.C. § 2000e-16. The framework within which employment discrimination problems are addressed under the statute has been established by the Civil Service Commission pursuant to its statutory mandate.[4] Rules and regulations were established in order to insure achieving the national policy of equal opportunity in employment. If the decision of the majority of the Fourth Circuit is allowed to stand it will be unclear which, if any, of the rules or regulations are enforceable under 42 U.S.C. § 2000e-16. Although the majority

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[4] Pursuant to section 3 of 1978 Reorg. Plan No. 1, 43 F.R. 19807, 92 Stat. 3781, effective October 1, 1979 all equal employment opportunity functions vested in the Civil Service Commission by 42 U.S.C. § 2000e-16(b) and (c) were transferred to the Equal Employment Opportunity Commission.

assumed that the regulation of the Postal Service involved in the appeal would be entitled to enforcement by a federal court, it did not consider by which means the regulation could have been enforced by Mr. Page. App. 26, n.10.

(3) The intent and meaning of the 1972 Amendments to the Civil Rights Act of 1964 are clearly frustrated by the Fourth Circuit's ruling. The legislative history of the 1972 Amendments shows that Congress was very concerned with correcting the entrenched discrimination in the Federal Service.[5] The emphasis on voluntariness and a defective complaint process were thought to contribute to a lack of equal employment opportunity. These defects

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[5] 2 U.S. Code Cong. & Adm. News, 2137, 2139, 2159 (1972).

were sought to be corrected by "...the effective application of uniform, fair and strongly enforced policies."[6]

Congress further recognized that the Federal Service was an area where equal employment opportunity is of paramount significance because Americans rely upon the maxim, "government of the people," and traditionally measure the quality of their democracy by the opportunity they have to participate in the governmental process.[7]

A decision which holds that rules and regulations promulgated in accordance with

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[6] Id., at 2144, 2158, 2159. This Court also recognized that strong internal safeguards were necessary if the national goal was to be achieved. Chandler v. Roudebush, 425 U.S. 840, 841 (1975).

[7] Id. at 2157.

42 U.S.C. §2000e-16 are not capable of redress under the statute flies in the face of the Congressional intention to establish uniform, fair and strongly enforced policies. Such a decision does not create confidence in government by its employees who would no longer have an administrative forum within which to complain of rule violations.

(4) The decision below is incorrect. The majority decision is based upon two premises. First, that the regulation involved is not capable of redress under 42 U.S.C. § 2000e-16 because it is not a "personnel action" within the meaning of the statute. App. 27, 28. The type of personnel actions contemplated by the statute are what the majority characterized as ultimate employment decisions "...such

as hiring, granting leave, discharging, promoting, and compensating." App. 28. Second, the proper manner to analyze disparate treatment cases such as the case at bar is to look to the ultimate employment decision and the reasons given for making the decision. Neither premise is in keeping with the purpose or intent of the 1972 Amendments to Title VII.

There is no statutory definition of the term "personnel action" in 42 U.S.C. § 2000e-16. Neither is there any discussion of the term in the legislative history of the 1972 Amendments. What is clear from reading the legislative history, however, is that voluntary compliance did not work and that effective enforcement procedures and the effective application of uniform, fair and strongly enforced policies were necessary and need-

ed in order to reduce discrimination in employment.[8] Section 42 U.S.C. § 2000e-16(b) required the Civil Service Commission to establish the procedures, rules or regulations necessary to carry out the purpose of the statute. Since the Postal Service regulations are a part of the regulations promulgated in accordance with Section 16(b), their violation would certainly be "personnel actions" subject to redress under the 1972 Amendments.

In analyzing this case under the principles of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the appeals court concluded that it was not necessary to provide a "legitimate, nondiscriminatory reason" for not following the regulations

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[8] 2 U.S. Code Cong. & Adm. News, 2137, 2139, 2157-2160 (1972).

because a violation of the regulations was not a "personnel action" within contemplation of the statute. If this Court finds that the regulations are enforceable as a part of the 1972 Amendments then the appeals court argument must fail.

Even assuming that a violation of the regulations is not a "personnel action" enforceable under 42 U.S.C. § 2000e-16, the testimony of the improperly constituted white review committee should not be used to overcome Mr. Page's prima facie case. The appeals examiner found, and the District Director of the Postal Service admitted, that "these were no established, objective, guidelines in existence for evaluating candidates for the position in question." App. 169-70. Each committee member also testified that the selection process was subjective in nature. App. 170-71.

As the Sixth Circuit held in Abrams v. Johnson, 534 F.2d 1226 (1976) when faced with similar testimony in an action brought under the Equal Employment Opportunity Act of 1972:

> ...Absolute discretion over employment decisions where subjective race prejudice may control (perhaps even without the executive's knowledge) is no longer consistent with our law. 534 F.2d 1231.

It is highly improbable that any federal official would admit discrimination in an employment decision. Therefore, when that official has been improperly designated to review promotions, and the criteria is only his subjective opinion, the testimony of the improperly designated official should be rejected as a basis for rebutting a prima facie case. App. 34-35.

In light of the legislative history, the purposes for which the 1972 Amendments were passed and the national policy of

promoting equal opportunity in employment of federal employees the majority opinion of the Fourth Circuit cannot be justified.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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